

Taft-Hartley Trustees May Not Advance Union Interests

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Introduction

A recent decision of the United States Court of Appeals for the Sixth Circuit serves as a reminder to Taft-Hartley benefit fund trustees of their duty to act solely in the interest of plan participants and beneficiaries and not to further the interests of unions. The case is *Duer Construction Company, Inc., et al., v. Tri-County Building Trades Health Fund, et al.*¹ The facts in *Duer Construction* are unusual in that the Taft-Hartley fund involved was one in which employees of both union signatory and non-signatory employers participated.

Background

The Tri-County Building Trades Health Fund (Tri-County) apparently started out as a traditional "union-signatory only" fund, but covering employees working under collective bargaining agreements negotiated by three (3) different unions—Bricklayers, Sheet Metal Workers, and Painters. However, the Tri-County plan documents defined "Employer" to include employers signatory to a collective bargaining agreement with one of the participating unions *and also* any firm "whose Collective Bargaining Agreement has expired with the Union participating in the Trust Fund, but who is obligated under [Taft-Hartley] to contribute to the Trust Fund." The Tri-County documents required

¹ 2005 US Appeals LEXIS 3032, 34 Employee Benefits Cases (BNA) 1817 (6th Cir. 2005). The Court has designated this decision as "not recommended for full text publication," which imposes conditions upon, and limits, its citation in future court proceedings.

participation by the employers' employees working under collective bargaining agreements, but also permitted the participation of the office clerical and supervisory employees of the contributing employers.

Duer was at one time signatory to an agreement with the Bricklayers Union. While it was signatory, it made contributions to Tri-County on behalf of its employees covered by the Bricklayers agreement as well as its office and supervisory personnel. In 1985, Duer ceased to be signatory to the Bricklayers agreement. Tri-County thereafter refused to accept contributions from Duer on behalf of Duer's bricklayer employees.

1986 Settlement Agreement

Duer sued Tri-County seeking to keep its bricklayer employees in Tri-County, apparently arguing that Duer was still an employer as defined in the Tri-County plan documents (an employer "whose Collective Bargaining Agreement had expired"). Under a 1986 settlement Duer signed an Assent of Participation obligating Duer to continue to contribute to Tri-County on behalf of Duer's bricklayer employees, and obligating Tri-County to continue to accept such contributions on an ongoing basis "until such time as the parties mutually agreed" to terminate the Assent of Participation. The settlement also required Tri-County to treat Duer's bricklayer employees no differently than the employees of any other Tri-County contributing employer.

Unsuccessful Organizing Efforts

The unions, particularly the Laborers and the Bricklayers Unions whose business agents were members of the Board of Trustees of Tri-County, continued to be unhappy with Duer's non-signatory status. Beginning in approximately 1990, both the Laborers and the Bricklayers actively attempted, unsuccessfully, to organize Duer's laborer and bricklayer employees.

2000 Assent of Participation

In July of 2000, Duer signed a new Assent of Participation form that applied only to its office and supervisory employees. It specifically excluded from its scope "production and maintenance employees and employees² who are performing work typically known to be bargaining unit work under any collective bargaining agreement within the construction industry." The Assent of Participation also provided that Tri-County trustees could exclude *all* employees of any employer that had made contributions into Tri-County for people who were not permitted to participate under the 2000 Assent of Participation. The 2000 Assent of Participation also stated that it superceded any Assent previously executed.

2002 Audit

In 2002, Tri-County audited Duer's contributions. The audit revealed that Duer was making contributions on behalf of a retired office/supervisory employee and was not making contributions for two other office/supervisory personnel. However, the audit found that Duer had continued to contribute on behalf of all of its bricklayer employees.

After the audit, the trustees voted to terminate all of Duer's employees from participation in Tri-County, thereby again refusing to accept contributions on behalf of *any* employees of Duer, justifying this decision at least in part on the basis that Duer had contributed on behalf of employees who were not entitled to participate pursuant to terms of the 2000 Assent of Participation. The letter notifying Duer of the vote was signed by the Chairman of the Board of Trustees of Tri-County who was also a Bricklayers Union business agent.

² The court's opinion does not set say so explicitly, but presumably this meant *office and supervisory* employees performing bargaining unit work.

Court Decision

Duer sued Tri-County again, alleging, among other things, a breach of fiduciary duties on the part of the trustees. Tri-County argued that the trustees had not breached their fiduciary duties because the 2000 Assent of Participation allowed the trustees to exclude *all* employees of any employer who contributed on behalf of people who were not permitted to participate.

Both the trial court and the court of appeals determined that the trustees had breached their fiduciary duties by terminating Duer's participation as a contributing employer in order to further the interests of the Laborers and Bricklayers Unions in organizing the employees of Duer. The courts found that the trustees' reliance upon the language of the Assent of Participation was a pretext to disguise the trustees' true motive of having the bricklayer and laborer employees of Duer be represented by the unions.

The court reached this conclusion based upon testimony that the reason at least three of the trustees gave for voting to terminate Duer's bricklayer employees' participation in Tri-County was that Duer was not signatory to a collective bargaining agreement. In addition, the auditor (who was also the auditor for the Bricklayers Union) had been told that the union wanted Duer out of Tri-County.

The courts found that the trustees had seized upon relatively minor transgressions (contributing on behalf of one employee who may not have been entitled to coverage) as an excuse to terminate the participation of all the non-union-represented bricklayer employees in support of the unions' organizing campaign. Accordingly, the court of appeals upheld the district court's permanent injunction, finding that the trustees acted out of an improper motive to advance union goals. The court of appeals barred Tri-County from refusing to accept contributions from Duer on behalf of its employees. There is no

mention in the court of appeals decision of whether any damages were sought or awarded by the district court.

Discussion

The ERISA fiduciary duty that was the subject of *Duer Construction*, is the "sole and exclusive purpose" rule found in 29 U.S.C. 1104(a)(1)(A) which states, in pertinent part:

...[A] fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and

(A) *for the exclusive purpose* of:

- (i) providing benefits to participants and their beneficiaries;
and
- (ii) defraying reasonable expenses of administering the plan.

(Emphasis added.) Also known as the duty of loyalty, this duty requires the trustees to be loyal to the plan participants, not to the unions, employers, or associations who appoint them. Serving the organizing goals of the Bricklayers and Laborers Unions was a breach of that "sole and exclusive purpose" rule.

Given that the trustees were serving organizing goals of the Bricklayers and Laborers Unions by terminating Duer's status as a participating employer in Tri-County, it might be natural to assume that the trustees who were also Bricklayers and Laborers business agents, such as the Chairman of the Board of Trustees, were the only "guilty" parties. However, because Tri-County is a Taft-Hartley fund, half of the trustees were appointed by management, and at least one of the management-appointed trustees had to vote in favor of the decision terminating Duer's employer status. Any trustee voting in favor of the motion is tarred with the same brush.

The court decision does not tell us whether the trustees' vote was unanimous or a simple majority. Strictly speaking though, either voting against, or abstaining from, such a measure may not be enough for a trustee to escape responsibility and liability for a breach of the "sole and exclusive purpose" rule. If a trustee is, or becomes, aware of a proposed action that would violate a fiduciary duty, the trustee's obligation goes beyond merely voting against it. ERISA requires a trustee to work actively to prevent the breach by advising fellow trustees of the rule and why the proposed action is in violation of it. In some cases, a trustee may even need to consider suing the fellow trustees to prevent the breach in order to escape liability himself or herself.

As noted, there is no mention of damages being assessed against trustees in the *Duer Construction* decision. However, where a court assesses damages (such as awarding benefits due to the Duer bricklayer employees for the time period when Tri-County considered them to be non-participants), the liability to the trustees is personal-- ***trustees may be held responsible for payment personally.***

Trustees are well-advised to learn the details of their fiduciary duties and should retain knowledgeable independent counsel to identify fiduciary duties associated with actions they take as trustees and to advise them of their obligations.